98-433

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SUPREME COURT OF THE

UNITED STATES

W. A. MERKLE, Warden
Petitioner,

V.

CLYDE E. SEIDEL,
Respondent.

No. 98-0433

MOTION
TO
PROCEED IN FORMA PAUPERIS

The Respondent/Defendant, by and through his appointed counsel, Arthur Pirelli, hereby moves for leave to proceed *in forma pauperis* as counsel was appointed in the United States district court and the United States court of appeals under the Criminal Justice Act of 1964, 18 U.S.C. 3006A.

December 1, 1998

Respectfully Submitted,

Arthur Pirelli

Arthur Pirelli
Attorney for Respondent
CLYDE SEIDEL

11 pp

CERTIFICATE OF SERVICE

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 507 Polk Street, Suite 320, San Francisco, California, 94102.

On December 2, 1998 a copy of the Brief In Opposition To Petition For Writ Of Certiorari and Motion To Proceed In Forma Pauperis was served by placing in the United States mail at San Francisco, California in a post-paid envelope, sealed and addressed to the party listed below:

Rene A. Chacon
Deputy Attorney General
Laurence K. Sullivan
Supervising Deputy Attorney General
Counsel of Record
50 Fremont Street, Suite 300
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I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of December, 1998 at San Francisco, California.

Arthur Pirelli

NO. 98-0433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

W. A. MERKLE, Warden, Petitioner

v.

CLYDE EDWIN SEIDEL, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR PIRELLI
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Counsel for Respondent

QUESTION PRESENTED

Does the holding of ***Keeney v. Tamayo-Reyes***, 504 U.S. 1 (1992), preclude an evidentiary hearing in a habeas corpus proceeding, absent a showing of cause and prejudice from failure to develop a material fact in the state court proceedings ?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case submitted by Petitioner with the following exceptions :

1. In granting the petition for a writ of habeas corpus on March 27, 1997, the district court relied not only on the evidence from the evidentiary hearing but the court also "carefully considered the papers submitted by the parties and the finding of facts and law by Chief Magistrate Judge F. Steele Langford."

2. In its decision of July 20, 1998, the Ninth Circuit Court of Appeal held that a federal habeas corpus petitioner does not have to establish cause and prejudice pursuant to ***Keeney v. Tamayo-Reyes*** for the district court to *exercise its discretion* and conduct an evidentiary hearing.

REASONS FOR DENYING THE WRIT

Petitioner argues that the Court of Appeals for the Ninth Circuit erred in holding that the district court properly exercised its discretion in ordering an evidentiary hearing without requiring the Respondent herein, petitioner below, to demonstrate cause and prejudice from failure to develop a material fact in the state court proceedings.

In doing so, Petitioner relies on ***Keeney v. Tamayo-Reyes***, 504 U.S. 1 (1992) arguing that ***Tamayo-Reyes*** altered the discretionary power of federal district courts to order an evidentiary hearing without requiring the habeas petitioner to demonstrate cause and prejudice for his failure to develop material facts in the state court.

The Petitioner further cites a split in the Circuits on the issue of whether or not ***Taayo-Reyes*** removed the discretion of the district court to hold an evidentiary hearing even where they are not mandatory. Petitioner points to ***Mitchell v. Rees***, 114 F. 3d 571 (6th Cir. 1997) and ***Mathis v. Zant***, 975 F. 2d 1493 (11th Cir. 1992).

There is no actual split in the Circuits on this issue, however, as the holding of this Court in ***Tamayo-Reyes*** clearly did not remove the discretion of the district court to grant an evidentiary hearing to consider any evidence relevant to a federal habeas petitioner's claim because that case addressed only when a hearing was mandatory.

In ***Mitchell v. Rees***, the 6th Circuit held that if the habeas petitioner did not develop

the record in state court he is *entitled* (emphasis added) to an evidentiary hearing only if ... Thus, the court only addressed the requirements for when a evidentiary hearing is *mandatory* and did not even address when the court can exercise its' *discretion* in granting a hearing.

With regard to ***Mathis v. Zant***, 975 F.2d 1493 (11th Cir. 1992) we would note the dissent of Judge Clark pointed out that the majority looked to case law that specifies when a district court is *required* to consider additional evidence and erroneously applied that law to determine whether or not a court *may* consider such evidence.

In addition, it is clear that ***Tamayo-Reyes*** did not remove the district court's discretion to grant an evidentiary hearing.

The Ninth Circuit, in its decision in the instant case, stated that the ruling in ***Townsend v. Sain***, 372 U.S. 293 (1963) could not be more clear in determining when a federal court in a habeas proceeding is authorized to hear additional evidence. The Court further pointed out that the ***Townsend*** Court stated that " the purpose of the [six part] test is to indicate the situations in which the holding of an evidentiary hearing is *mandatory* (emphasis added). In all other cases where the material facts are in dispute, the holding of such a hearing is in the *discretion* (emphasis added) of the district judge."

Finally, the Ninth Circuit, below, pointed out that the issue in ***Tamayo v. Reyes*** was not whether the district court was authorized to hold an evidentiary hearing, but whether the district court was required to order an evidentiary hearing. Thus, the court stated, ***Tamayo-Reyes***

did not affect the ***Townsend*** holding with respect to the district court's broad authority to consider any evidence relevant to a federal habeas petitioner's claim, citing ***Tamayo-Reyes***, 504 U.S. at 23 (O'Connor, J., dissenting stated "The district courts ... still possess the discretion, which has not been removed by today's opinion, to hold hearings even when they are not mandatory.")

CONCLUSION

-This case does not merit further review by this Court. For the foregoing reasons the Petition should be denied.

Dated: December 1, 1998

Respectfully Submitted,

Arthur Pirelli

ARTHUR PIRELLI
Counsel for Respondent
CLYDE EDWIN SEIDEL